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The Right of a State to Discriminate against Foreign Corporations

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GRADUATION THESIS.

WRITTEN FOR DEGREE OF LL. B.

THE RIGHT OF A STATE TO DISCRIMINATE AGAINST

FOREIGN CORPORATIONS.

BY

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THE RIGHT OF A STATE TO DISCRIMINATE AGAINST

FOREIGN CORPORATIONS.

CHAPTER I.

D E F I N I T I O N :- According to the celebrated definition of Chief Justice Marshall in the Dartmouth College Case, corporations are defined to be, "artificial beings, invisible, intangible, and existing only in contemplation of law"; but in recent years, there has been, and in most cases with much justice, a strong tendency from a practical and business standpoint, to question the precise accuracy of this definition, claiming that we should look through the legal entity to the persons who compose the same, thus treating the corporation for certain purposes as substantially consisting of several natural beings, rather than as one intangible artificial being. Such was practically the view taken when a corporation was held to be a citizen for the purpose of jurisdiction, and again, when held to be a person, so also in cases of fraudulent practices, etc.. In fact it would seem that a corporation is

nothing more nor less than a partnership with certain privileges and liabilities attached.

C L A S S I F I C A T I O N :- According to one principle of classification, all corporations are divided into domestic or foreign, accordingly as they are organized or incorporated within or without the State, and by such as are incorporated without the State, called foreign corporations, are meant not only those incorporated in other nations, but also such as are incorporated in other States of the same nation.

Again foreign corporations may well be subdivided for our convenience, into two great general classes , as follows:

First:- Such as are engaged in commerce, interstate or international.

Second:- All other foreign corporations.

Corporations chartered by the general government, such as national banks, certain railroad corporations, etc. belong to neither of the above subdivisions, but rather, should be treated as domestic corporations with certain additional privileges, such as freedom from taxation on their franchises, without consent of Congress, upon the ground of their being agents of the government. (Mc Culloch v.

Maryland, 4 Wheat., 316,368; Osborn v. Bank of U. S., 9 Wheat., 738; Cal. v. R. R. Co., 127 U. S.,1;) However, their property within the State is not exempt from an equal taxation with all other property of that State.(Railroad Co. v. Peniston, 18 Wall., 5)

C O M I T Y :- Comity is a common law privilege or a act of courtesy by which foreign corporations are allowed to exercise their corporate powers in any or all of the various States and nations. It is not a right but a matter of grace, that is, it rests in the will of the State. (Mortz . Vol. 11., #9,58)

In general all foreign corporations whether of the first or second class, may exercise by this common law comity all corporate privileges given to them by their charter, not only in the State creating them, but also in each or all of the several States of the Union, so long as such exercise does not interfere with public policy or laws, expressed or implied, of such other State or States. In other words, while a State may not grant to a corporation a franchise(which is the conferring of special privileges or immunities not allowed to the community at large) to be exercised as of right in another State, the laws of a State having no extra-territorial effect, still by comity

Each state may and generally does extend to all duly incorporated foreign corporations, the legal right to carry on its business within its jurisdiction. (Mort. Vol.II. #958) This courtesy, as indicated, may be withheld at pleasure. And why should it be otherwise? Why should the local laws of one state be forced upon the people of another State? Such would be inconsistent with State sovereignty.

As to foreign corporations of the first class, with one possible exception hereafter to be mentioned, they have not only the common law right of comity but also a constitutional right which can only be taken away by Congress itself and with which the States have no right whatever to interfere, while as to the second class, the right of comity only is theirs, and even that right may be limited or denied.

A reference to history would present many instances of the exercise of this privilege among nations. Many corporations organized in the United States have entered into contracts with various foreign nations, but nowhere can a decision be found in which the validity of these contracts has ever been questioned by such foreign nations, and to

presume that the inforcement of the same will ever be denied in America, on such grounds, could be based upon no sound reasoning in view of the past history and present trend of the American courts on this subject.

While this has uniformly passed unquestioned among nations, yet in some of the very early cases it was earnestly contended that it had no application among the several States; but later in the case of the Bank of Augusta v. Earle, 13 Pet., 586, it is stated that not only has it an historical precedence -- that of usage -- but also numerous decisions from nearly all the States on which to base this claim. Further, the court said: "The public and well-known and long continued usage of trade; the general acquiescence of the States; the particular legislation in some of them, as well as the legislation of Congress -- all recognize the existence of this principle."

Again in the case of Christian Union v. Yount, 101 U.S., 56, the court said: "In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that the corporations of one State not forbidden by the laws of its being, may

exercise within any other State the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy, to be deduced from the general course of legislation or from the settled adjudications of its highest courts."

Thus, again, it seems, as has often been said, "silence gives consent".

C H A P T E R II.

TAXATION.

Section I:- Of such foreign corporations as are not engaged in interstate or international commerce, i.e. those of the second class.

Section II.- Of such foreign corporations as are engaged in interstate or international commerce, i.e. those of the first class.

SECTION I.

Taxation of Non-interstate or Non-international Foreign Corporations

That such corporations may be taxed, as a matter of law, can scarcely be questioned, but as to the grounds upon which this conclusion has been reached and the extent to which the same may be exercised, our attention will now be returned.

In treating of this subject we will consider the same in the following order:-

First:- The right of a State to tax a foreign

corporation as a condition precedent to its entering and doing business within its territory, and the extent of such taxation.

Second:- Its right to tax such foreign corporation as are already legally within the State.

(First)

A solution of this first proposition involves, in connection with the principles of comity, an answer to the following question :

Is a corporation a citizen within the meaning of that clause of the United States constitution which says : " The citizens of each State shall be entitled to all privileges and immunities of the citizens in the several States"?

Prior to the adoption of the constitution, there was no provision by which either the citizens or corporations of one State were entitled to the privileges and rights of the same in other States. The Articles of Confederation were silent on this subject and Congress was powerless to interfere, hence the matter was left entirely in the control of the several States and such States with their own

personal ends in view passed such laws as they saw fit. Great was the variety thereof. Much unfriendly and impartial legislation was promiscuously practised throughout the United States giving rapid growth to a spirit of antagonism.

Retaliation which to day is exercised among many of the foreign countries seemed inevitably to be their controlling principle-a principle which can and could not be consistently practiced among the citizens of those States whose intention was to form one indistructable Union of indistructable States". Harmony and uniformity, so essential to such a Union, were rapidly being displaced. An ever widening gulf seemed inevitably to sunder that bond of (Union which were to bind them as one.

Such a condition of affairs furnished one of the moving causes of the adoption of the present constitution. Foreseeing the inevitable results, the framers of that greatest of instruments, with much wisdom, introduced the clause above referred to, namely: "The citizens of each States shall be entitled to all privileges and immunities of the citizens of the several States."

That no State has a right to interfere to prevent any citizen from entering its State and engaging in, as an

individual, in like manner and on equal footing with its own citizens, has since the incorporation of this clause into the constitution never been questioned. And it was earnestly contended that the word "citizen", as there used, should, in like manner, apply to a corporation; that no State should be allowed to exclude, refuse to admit, or unjustly tax any such foreign corporation any more than a citizen of another State. This led to an examination of the comparative meanings of the word "corporation" and the word "citizen".

Cooley says; "The privileges and immunities in said clause belong only to State citizenship and which, were it not for this clause, might be subject to hostile State legislation." Again, in *Conner V. Elliott*, 18 How., 591, "According to the expressed words and clear meaning of this clause no privileges are secured by it but those which pertain to citizenship." As to the meaning of the term citizen as here used and for proof that a corporation is not considered a citizen within such meaning, no more authoritative references can be made than to the cases of *Paul v.*

Virginia, 8 Wall., 168, and Bank of Augusta v. Earle, 13 Pet., 586.

Of these two cases, the Paul case is generally cited as the leading authority and the opinion is perhaps one of the most scholarly discussion ever written upon the subject, and an extensive examination of the same may here be made with profit, as involving both the subject of comity and corporations. In this case the court said, "The term"citizen"as here used, applies only to natural persons, members of the body politic, owing allegiance to the State, and not to corporations which are artificial persons created by legislation and possessing only the attributes which legislation, has prescribed. It was there further urged that as the foreign corporation was composed of citizens of another State, the courts should look behind the artificial being to the real persons composing the same so as to afford them protection, citing an early decision, (2 How.497), but that case was expressly confined to a question of jurisdiction and did not extend to contracts, made by corporations. The court said, "If it were to embrace contracts, and the members of the corporation were to be regarded as individuals carrying on business in the corporate name, and therefore

entitled to privileges of citizens, they must at the same time take upon themselves the liability of citizens and be bound by their contracts in like manner: that the result of which would be to make the corporation a mere partnership each being individually liable for the debts of the corporation: that the clause of the constitution could never intended to give citizens of each State the privileges of citizens of the several States and at the same time to have exempted them from the liabilities attendant upon the exercise of such privileges in those States for, this would be to give the citizens of other States higher and greater privileges than are enjoyed by the citizens of the State itself, and would deprive each State of control over the granting of franchises within the State. Extra-territorial operation would be given to local legislation destroying the independence and harmony of the States. Men of wealth from other States would practically control the business of these States. The only way to keep them out would be to deprive their own citizens of the same privileges."

' Whenever a corporation makes a contract it is the contract of the legal entity, the artificial being created by its charter, and not the contract of the individual

members thereof. The only rights it can claim are those which are given to it in that character, and not the rights which belongs to its members as citizens of a State . The clause in ~~q~~uestion doubtless was intended to place the citizens of each State upon the same footing with citizens of other States so far as the advantages resulting from citizenship in these States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other State it gives them the right of free ingress into the State and egress from them, thus forming the present grand Union without which it would have been little more than a league of States. But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are such as are common to the citizens of the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own State are not secured in other States by this provision. This could not be expected. It was not intended by it to give to the laws of one

State, any operation in other States. They have no such operation except by the permission expressed or implied of those States. The special privilege which they confer, must, therefore, be enjoyed at home, unless the assent of the other States to this enjoyment therein is given. A grant of corporate existence is a grant of special privilege to the corporation to enable it to act for certain designated purposes as a single individual and exempting it from individual liability. "The corporation being the mere creature of local law can have no legal existence beyond the limit of the sovereignty where created." As said in *Bank of Aug. v Earle* "It must dwell in the place of its creation and cannot migrate to another sovereignty."

The recognition of its existence even by other States and the enforcement of its contracts make them depend entirely upon the comity of those States; a comity which is never granted when the existence of the corporation or the existence of its power is prejudicial to their interests or repugnant to their policy."

Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their consent it follows, as a

matter of course, that such may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict the business to particular localities or exact such security for performance of its contracts with their citizens, as in their judgement, will best promote the public interest. The whole matter rests in their discretion." They may tax them at their pleasure, without even being questioned as to the motive for the same. (People v. Phila. Fire Ins. Co. 92 N. Y. 311.)

The leading case of the Bank of Augusta v. Earle 13 Pet. 586., decided prior to the Paul Case and cited therein, also holds that a corporation is not a citizen and that it can have no extra-territorial operation except as it is either expressly or impliedly granted.

While the same question had been up before the court prior to the Paul and Georgia decisions, in the case of Head v. Providence Ins. Co., 2 Cranch 127; also in the Dartmouth College Case 4 Wheat. 636, in both of which Chief Justice Marshall wrote the opinion, and later in the case of Bank of U. S. v. Dandridge, 12 Wheat. 64, besides in

numerous other cases since, yet it has always been with the same result and invariably have the Paul and Georgia cases[^] been cited as standard authority whenever the exact question has since appeared before the courts.

The leading case in New York on this subject is the case of the People v. Phila. Fire Ins. Co. 92 N. Y. 311, cited above, in which a very able opinion was written by Finch, J. - the same case being approved in Phila. Fire Ins. Co. v. State 119 U. S. 110 . To the same effect is the case of Pembina Min. Co. v. Pa. 125 U. S. 181, in which Bradley, . quoted extensively from the Paul Case.

To the above rule, that any condition precedent, may be required, there is the exception as already indicated, that a State may not demand, that a corporation shall not appeal to the United States courts-a corporation for that purpose being held to be a citizen and hence protected by the U. S. Constitution.

Prior to 1844, no where either in England or America had a corporation been so considered for any purpose, but in that year the courts held in the case of Louisville R. R. v. Letson, 2How. 497, that where a corporation is created by laws of a certain State, it is legally presumed that its

members are citizens of that State, and that a suit by or against such corporation is a suit against citizens of the State creating it. Later this presumption was held to be conclusive. (*Marshall v. Baltimore & Ohio R. R. Co.* 16 How. 314; *Covington Draw Bridge Co. v. Shepherd*, 20 How. 227; *R. R. Co. v. Harris*, 12 Wall. 65) Logically, it, was but a step farther to hold that the members of a foreign corporation are, in like manner, citizens of such foreign State for the purpose of jurisdiction, and hence, in suits by or against foreign corporations it amounted to the citizens of one State or the State itself against the citizens of another State. *Steamship Co. v. Tugman*, 100 U. S. 118. And further, that a State cannot restrain a foreign corporation from resorting to Federal jurisdiction, see *Ins. Co. v. Morse*, 20 Wall. 445; *Doyle v. Continental Ins. Co.* 94 U. S. 535; also *Barron v. Burnside*, 121 U. S. 186.

It is in this class of decisions that we for the first time, notice a tendency of the courts to look through the corporate entity to the individual members composing the same.

From the above discussions we may extract the

following legal propositions:- that a corporation is not a citizen within the meaning of that clause of the constitution which secures to the citizens of one State all the privileges and immunities of the citizens in the several States"; that a foreign corporation not engaged in interstate commerce has no extra-territorial rights; that it may, without obtaining express consent, exercise the privileges granted to it by its charter, outside of the State creating it, only by comity; that this comity is always extended by the States unless contrary to public policy or an express statute etc.; that a State may meet a foreign corporation at its border and demand as a prerequisite to its entering, any condition it may see fit to impose except that it may not interfere with its right of appeal to the United States Courts; that it may impose various taxes and hence may absolutely refuse admittance, for as said by Chief Justice Marshall, "the power to tax includes the power to exclude", or that in substance.

From the above it would seem that the question is not, as to whether a State may require of a foreign corporation about to enter its jurisdiction, a condition precedent, but rather as to whether the condition imposed is in

fact a condition precedent. This is well illustrated in the case of *People v. Phila. Fire Ins. Co.*, 92 N. Y. 311, a full discussion of which will appear later.

Recalling the real objects of the clause in question, that one of the most important of them was to secure the free right of the citizens of one State to carry on any lawful business allowed to the citizens in other States, on equal footing with such citizens in those States; that it was to secure liberties and privileges and uniform laws; and remembering that most of the business was then carried on by citizens in their individual capacity; that the numerous great railroad, telegraph, and large manufacturing corporations of the present day, could scarcely have been in contemplation of the framers of the constitution; that in early times corporations were considered strictly as artificial beings etc., and looked upon with much distrust, could we, in the light of all these facts, reasonably expect any other decision than was reached in the *Paul and Virginia* cases, namely, that a corporation is not a citizen with the meaning of that word as above used?

But on the other hand, remembering that time often makes many changes; that now, as said by Bradley, J. "The

larger part of the business of this country has come to be transacted by corporations which have been found, since the earlier decisions of the Paul and Virginia cases, to be so convenient, especially as avoiding a dissolution of membership, while their most objectionable feature -non-liability of members- has in most instances been abrogated in whole or in part;" that since those early decisions corporations have gradually come to be looked upon in a much different light -the tendency being not to consider them so much as artificial beings, but rather to look through the corporate fiction to the members who actually compose the same- to look at the effect rather than the form. And further, bearing in mind, as said by Bradley, J., that" so strongly is this modern view of a corporation felt that, in the recent case of Santa Clara Co. v. Southern Pac. R. R. Co., 118 U. S. 394, the doctrine that corporations are not citizens or persons within the protective language of the constitution, was unanimously disproved, and the court expressly held that they are entitled, as well as individuals, to the equal protection of the laws under the Fourteenth Amendment"; that in effect the same retaliatory^a legislations which were so destructible prior to the constitution and which

the clause in question in that instrument especially intended to avoid, are to day being freely, exercised by all the States with scarcely a restriction upon the same disastrous results, which then so stirred the people; that this is brought about by the fact that the business that was then carried on by individual citizens whom the constitution provided for, is to day, as referred to above, being conducted almost entirely by corporations which are held not to be citizens and hence not equally protected by the constitution; can we, in the face of all this, come to any other conclusion than that one of the principal effects of the clause in question has practically, to a great extent become nugatory?

In view of the above, may we not, with much reason, question whether or not a corporation should not, in effect be considered a citizen to the extent at least that the corporations of one State may be entitled to all the privileges etc. of the corporations in the several States? Why is there not to day the same reason for giving to the corporations of one State such privileges in the several State as there was to give these corresponding rights to the citizens of the various States in the several States? Corpora-

tions are, in reality, nothing but a combination of citizens for the purposes of facilitating business; nothing but a partnership with certain additional privileges and liabilities. This view is strongly favored in the above case, holding a corporation to be a person, and again in those cases holding it to be a citizen for the purposes of jurisdiction. Why if for such purposes, it may be held to be a person or a citizen, should not the same reasoning entitle it to be considered a citizen for other purposes-especially taxation-and thus allow them to freely enter the states without complying with conditions precedent? Such a holding would not only seem reasonable, but in the light of the present tendency of the courts, would also seem to be necessary that justice may be had. It would avoid many of the practical injustices, hereafter to be mentioned, which were intended to be prevented by holding that a corporation was a person, and again it would furnish an amicable disposal of many conflicting opinions in regard to interstate commerce corporations which will also be discussed later. To bring about this change, that a corporation be considered a citizen, in the light of the many established decisions uniformly holding the contrary, and the reluctan-

of the courts to reverse their own decisions, perhaps the only practical way of accomplishing the same would be by amendment to the United States Constitution.

(Second)

The extent to which a foreign corporation may be taxed in this or any other State.

Assuming, for this purpose , that a foreign corporation is lawfully within this State, either by comity or by complying with such conditions as the State may rightfully have imposed, the questions follow:

May such State tax it more severely than it does its own domestic corporations, or may such foreign corporations refuse to submit to any greater burdens than are imposed on the domestic corporations engaged in a like business? May such foreign corporation demand equal treatment and protection under that clause of the U. S. constitution which says that "no State shall deny to any person within its jurisdiction the equal protection of the laws," or in other words is a foreign corporation admitted into this or any other State a person within the meaning of this clause?

That judges in interpreting the meaning of the various provisions of the U. S. constitution should investigate the surrounding circumstances or emergencies giving

rise to the introduction of such provisions that they should endeavor to ascertain the intent of the framers of the same, by an examination of the debates in the constitutional and various State conventions and the discussions in the Federalist, must be recognized as a generally accepted and proper rule to follow (Cooley's Const. Law, p 157)

Were this an absolute and inflexible rule, as claimed by some, well might it be doubted whether a corporation should be included in the clause in question, for while much discord had arisen over the regulations of corporations prior to that time, yet nowhere, in all the discussions leading to the adoption of the same, can it be shown that the subject of corporations received any attention whatever and perhaps it might seem strange that in the light of these facts, had it been their intention to provide for the same, that they did not give them at least a passing mention. Especially would this seem natural, as some of the courts at that time had held a contrary view to what is now claimed. *Ducat v. Chicago*, 95 Am. Dec. and notes.)

Such were the arguments presented in the cases following the Fourteenth Amendment, in which the clause in

question may be found . As a matter of fact, that corporations were not discussed, can scarcely be questioned. In the Slaughter House Cases 16 Wall. 36-81, one of the first important cases on the subject on this subject, Chief Justice Miller said: "In the light of the recent history of these Amendments (13, 14 and 15) and the pervading purpose of them which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in a State where newly emancipated negroes resided which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by the clause and by it such laws are forbidden. And further by way of dictum, he says: "We doubt much whether any action of a State, not directed by way of discrimination against the negroes as a class, or on account of their race will even be held to come within the purview of this clause." While this dictum was much too ^{of} broad a statement, we cannot but perceive the courts convinced views as to the meaning of this clause. Such were the claims of many.

Granting this to be true, it must still be born in mind that at the time of the adoption of this Amendment, the people were in a highly excited state. There was one

thing uppermost and all-absorbing in their minds--the emancipation of the recently enslaved and oppressed negro. Is it strange that under such a turmoil of excitement, in regard to so important a subject, that a more subordinate matter should not have received direct attention? And are we on that account, to presume that the framers were entirely ignorant of the previous use and legal meaning of the word "person"? or rather should we presume that in the light of the fact that Blackstone treated of Corporations under the head of " Rights of Persons," where he said, " Persons also are divided by law into either natural persons or artificial" (Book 1. 123) , and that a like view was taken by Kent (11. Kent, 316), that they were not ignorant of this legal meaning? Are we thus to impose upon the great men of those days, and give a strict and narrow construction to this word "person"? or are we to look at it in a broader light and say that it may include Chinese, and others similarly oppressed as well as the negro; that it may include artificial as well as natural persons?

Suppose as a matter of fact, the authors of this clause containing this word, did not have in mind a corporation, still the meaning of the word admitting of such a

construction, as shown by Blackstone, Kent and others, are we to say, especially when necessity and justice shall demand otherwise, that because it was not the expressed intention of the framers, that the courts cannot so construe it, and and thus possibly avoid the trouble and expense of another amendment? Or is the rule of interpretation sufficiently elastic in such cases to admit of using the word in its full legal sense, regardless of the exact meaning intended? That is, at the most, all that would be done by including corporations in the meaning of the word "persons", and it is nothing more than what has often been exercised before, both in England and America.

Many instances will serve to illustrate the recognition of this right to expand the at first supposed limited meaning of a word into its full meaning, as justice may demand. Could we expect that a court which had already declared that a corporation was a citizen for certain purposes would decline to call it a person? Certainly not, and such a conclusion is eminently just. There would seem to be no reason why a corporation which is composed of individuals should be denied the equal protection of the laws or deprived of property without due process of law.

It would seem from this line of reasoning that the word "person" should include a corporation, and in this conclusion we are sustained by the decisions of many courts.

The first and one of the most important cases upon this subject and which sustains this conclusion is the case of *County of San Mateo v. Southern Pacific R. R. Co.* , 13 Fed. 722, in which, Field, J., writing a very exhaustive opinion, held that a corporation was such a person for the purpose of protecting property and was entitled to the equal protection of the law: that while metaphysically corporations have been considered as artificial beings, etc yet practically the courts should look behind the mere name or entity to the persons who actually compose the same; that they should look to the result or effect of such tax and not at the mere form, and that by so doing it is found that, while the tax is said to be a tax on the property of a mere artificial being etc., yet as a matter of fact the effect is a tax upon the corporate property of the individual stockholders who are actual persons and who, should, therefore, be protected as such, so far as taxing their property is concerned.

The theory once held, that a tax on a corporation

is not a tax upon the persons, or property of the corporators or stockholders(95 Am. Dec. 529, and notes) has now with much reason ceased to be generally recognized; for in reality the property of the corporation is nothing more nor less than the property of the individuals, and a tax on that property is a tax on the individual's property; for while it is claimed that the tax is paid out of the corporate property, that being the individual's property, it is actually paid by the individual.

It would seem that the same result might be reached by considering the corporation as a domestic corporation after admission within the State, for admitting it by comity or express condition, the State has thus substantially adopted the charter of the foreign corporation as if granted by the State itself, but this question has never seemed to have received attention.

Since the decision in the leading case last cited, the view there laid down, has ever since been uniformly adhered to and notably in the following cases:-

10 Wall. 65,86; SantaClara Co. v . Southern Pac. R. R. 118 U. S. 394; Pembina Mining Co. v. 125 U. S. 181; Charlotte, Augusta & Columbia R. R. Co. v.

Gibbes, 142 U. S. 386.

Yet it is claimed that there are conflicting decisions on this subject. It has many times been argued and insisted that *Ducat v. Chicago* 10 Wall. 410, decided prior to the Fourteenth Amendment, and the *Phila. Fire Ins. Co. v. New York*, 119 U. S. 110, decided since, each support the opposite view, i. e. that discrimination in taxation may be made against foreign corporations within a State. However, I think, that a careful examination of the same will show that they may easily be harmonized with the present law as to Corporations, by showing that the question as to whether a corporation is a person was not properly before the courts in either of them, but rather that they furnish excellent examples of the proposition that a State may impose any condition precedent to their entering the same.

In *Ducat V Chicago*, 10 Wall. 410 the State of Illinois passed statutes requiring all foreign Insurance Companies to comply with certain conditions as a prerequisite to their engaging in business within the State, and further if they should desire to carry on the same in the city of Chicago, then in addition, they should pay two dollars on every hundred dollars of premiums received. With the first

statute, the corporation complied, and entered and did business in the State. Subsequently it also did business in the city of Chicago, whereupon the tax of two dollars was demanded. The corporation defused to pay upon the ground that having complied with the conditions of the first statute, it was already legally within the State, and could not be more severely taxed than the domestic corporations, relying on the constitutional provision in question claiming that the State had violated the same by requiring a greater tax from them than from the domestic corporations doing a like business in Chicago. At first this might seem to be true; but when it entered the State, it was expressly understood that should it desire to engage in business in Chicago, it could do so by paying the additional tax. Therefore by fulfilling the first condition the corporation was admitted to all parts of the State except Chicago, and it knew that if it desired to carry on business there, that then it must first comply with the extra conditions. On entering it, it impliedly consented so to do; that otherwise it was not lawfully within Chicago, but only in such other parts of the State as were outside of Chicago, and hence a tax of two dollars was and might

lawfully be imposed as a condition precedent to its doing business there, and therefore having done business there it was accordingly liable for the same.

Again, in the case of the People v. Phila. Fire Ins. Co. 311, and in Phila. Fire Ins. Co. v. New York, 119 U. S. 110, where the same case was approved, we, as a matter of fact, find the same principle laid down. New York passed a statute by which all foreign corporations desiring to do business in this State should comply with such conditions and pay such taxes as a condition precedent, as the State from which it came should require of similar corporations in from our State desiring to do business their territory. With this statute in view and knowing of the liability of a change, the Phila. Fire Ins. Co. sought admittance within the State of New York and paid the tax imposed by a previous statute of New York, which was a two percent tax, and continued to carry on business for a year or two, when Pennsylvania passed a statute by which New York corporations were obliged to pay a three percent tax, thus increasing the tax already charged upon the Phila. Fire Ins. Co. by one percent. The Company continued to do business for some time after this additional imposition but did not pay the

extra tax, whereupon New York brought action for the recovery of the same. The company claimed that it was already in the State, and had been there for some time prior to the levying of the additional tax and that therefore such unequal tax was unlawful, under the constitutional clause which says that "no State shall deny to any person within its jurisdiction the equal protection of the laws". But the court said that inasmuch as the State may impose any condition precedent, it could at any time even revoke such license and exclude the corporation entirely; that as a matter of fact each certificate received gave the corporation license to act for but one year and that the end of each year it was in law deemed out of the State and must again gain admittance and hence comply with the requisites of that time; and this would seem to be eminently just for otherwise different corporations from the same State might be differently taxed, accordingly as they entered the State under one statute or another. On continuing to do business the corporation impliedly consented to such additional tax as a prerequisite, and promise to pay the same in the future whereupon it was allowed to remain, the State, in effect, agreeing to waive simply the right to immediate payment.

For example, should A desire to buy a horse of B, for which B asked two hundred dollars, impliedly B would mean two hundred dollars in cash, and A would have no legal right to take the horse without paying for the same, But is it for a moment to be said that A and B cannot enter into an agreement either express or implied, by which A might be allowed to take the horse immediately on agreeing to pay for it at some future time? i. e. May not B waive immediate payment? And so, should B allow A to take the horse without saying anything about payment of the two hundred dollars, would it not be presumed that A promises to pay for it at any time when B should demand the same? B simply waiving immediate payment? And could A after getting possession of the horse, deny his promise and still retain possession of the same?

Such was the relation of the Philadelphia Fire Ins. Co. to the State of New York, and it is with much logic, it would seem, that the State was allowed to recover, inasmuch as the tax was a condition precedent to entrance into ^{the} ~~entrance~~ State, the corporation having no legal existence therein, so far as that tax was concerned, until the same was paid. Hence it not being within the State when the tax was ~~levied~~

levied, the claim that it was an unjust taxation, under the clause in question is without foundation. As was well said by Finch, J. in *People v. Phila. Fire Ins. Co.* supra, "The Fourteenth Amendment can apply to foreign insurance corporations, only after they have performed the conditions upon which they are entitled to admission; Any other view of the case would involve this absurdity; that the company may agree to pay the tax charged, so as to get within our jurisdiction, and then refuse to pay it while insisting upon the right to remain. It cannot agree to the conditions and then after admission dispute them."

Thus it is seen that in neither the *Ducat* nor *Phila.* case, was the corporation in question within the State, and hence that they furnish examples of unjust taxation of foreign corporations within the State, as claimed by some, is not true. However they furnish good examples of the fact that, that a State may require of such foreign corporations a condition precedent to their entering such State is no longer disputed, but the question being rather as to whether the conditions in question are in fact conditions precedent.

From the above cases it would seem, that the word

"persons" as used in the Fourteenth Amendment includes a foreign corporation; that such a decision has been reached through a logical course of reasoning based on justice and historical precedents; that while in framing the Fourteenth Amendment its authors may, as has been said by an eminent lawyer have "builted wiser than they knew" yet we are not to be precluded from any additional benefit which may accrue there from; that in the absence of express terms we are not to be confined to the use of a word in its limited meaning when justice and the developments of time demand a more liberal construction.

REAL EFFECT:- While it has been the tendency of the courts to hold that foreign corporations within a State may not be more severely taxed than the domestic corporations, yet, assuming this to be true, it would still seem, if we look at the real effects and not at the mere form that we have this anomolous situation, which cannot be avoided under the present holdings of the courts, to wit: that while a State may fully respect the constitutional provision, "that no State shall deny to any person within its jurisdiction the equal protection of the laws", still it may, in effect, tax any foreign corporation to any extent

it may desire. From the fact that it may require any condition precedent, it may therefore refuse to license the corporation for more than one year at a time, as in the Phila. case, or for more than six months, or for any other length of time, Thus at the end of each period, being legally out of the State, the State may as a condition of re-entrance be again taxed unlimitedly at the discretion of the State. What is the effect? Simply that at any time, by proper planning, a State may tax any foreign corporation to any amount. To be sure the corporation may stay out, but if it does come in and continues to do business, nowhere in the constitution can there be found a clause to prevent, in effect, a State's practically taxing it every moment of its stay, heavier than it taxes its own domestic corporations. I can see no reason, if a corporation should enter New York State this year, and lay out a large sum of money in any kind of business, why New York may not turn around and practically destroy the greater portion of such property by simply increasing the tax to such an extent as to make the business unprofitable.

And further while corporations have been held to be persons, yet by a close examination of the cases it may

be questioned whether any of them squarely hold that the clause under consideration, includes corporations for the purpose of taxation, for in nearly every instance the corporation was found not to be properly within the State.

If this be true nowhere in the United States constitution can there be found a provision compelling the States to tax equally all property within their jurisdiction. And in some of the State constitutions there is no provision compelling equal taxation. (Cooley's on Amer. Const. Law, 317)

This is so in New York. Therefore it would seem, there being no provision in the United States Constitution or in The New York Constitution compelling equal taxation of property, that even after a corporation has been properly admitted within this State, still the State is under no obligation to tax it equally with other corporations.

And again, were we to interpret the provision in question in view of the situation at which it was aimed (the liberation of the slaves), were we to construe it in the light of the surrounding circumstances, etc. at the time of its adoption, as is the rule laid down by Brewer, J. in the late case of *Rector v. U. S.* 12 Supr. Ct. Rep. 511, then might it well be questioned as to whether there are

sufficient grounds for even holding a corporation to be a person.

For the reasons above stated, especially the first one, it is evident that the only way for foreign corporations to be certain of receiving fair treatment in the future, is by considering them citizens. It may be argued that the same objection as to uniform taxation applies to a citizen. While this may be true, yet practically, the question will probably never arise. The government being based upon the fundamental principles of equality, the citizens would never submit to the same, were it attempted.

Section II.

Control of Interstate Commerce Corporations

Under the confederation commerce, especially interstate, was very loosely controlled. Congress had no power whatever over the matter; it was left entirely to the will of each State to pass such laws as it might deem most desirable in regard to all traffic and transportation through its territory. This unlimited control in the several States necessarily gave rise to a great variety of laws upon the subject, resulting in much discrimination among the different States- each legislating with its own selfish ends in view, passing such laws as would most increase its own interests at the expense of the other States.

Naturally this selfishness developed a hostile and bitter feeling, in consequence of which, much hardship was experienced particularly by such States as were so situated as to make it necessary for them to carry on their business through other States. Such States were practically at the mercy of those having particularly fine harbors and advantages, and through which it was necessary for them to pass.

Evidently this condition of affairs was destined to be the source of continuing and increasing troubles, not in

accord with harmony and a "more perfect Union", unless some means should be devised whereby an amicable disposal of the matter might be had, and whereby out of discord harmony might reign.

The great men of those days were equal to the occasion, and in this did they again find another great cause for the adoption of the United States Constitution. They saw that so intimately concerned were the relations of the people of the several States to each other that any differences in legislation in respect to them, or any divergence in judicial decision, might lead to infinite contentions and mischiefs, ^{if left to comity alone} and hence to avoid this they embodied in the constitution the following remedial clause "Congress shall have power to regulate commerce between the nations, among the several States, and with the Indian tribes."

By that instrument such powers as were surrendered to Congress, were denied to the States, and thus it was hoped to place the matter beyond further discussion. But not so-so determined was that selfish, antagonistic disposition, that not without a thorough construction of this clause were they to be contented. The great number of litigated cases on this subject since, and the fact that some

of the States, having the best harbors for a time refused to join the Union, because thereby they would lose that unjust advantage which they then were exercising at the expense of other States, both furnish the best evidence of the natural and persistent dispositions of the States to encroach upon this forbidden ground, and the wisdom, foresight, and necessity of such a preventative clause.

As to what constitutes a regulation of interstate commerce had for some time caused much dispute. The various States from time to time, in desiring to get around the effects of this clause, have passed many ingeniously constructed statutes, the results of which have been to lead the courts into various decisions more or less conflicting, as to the scope of the same.

Commerce, to put it concisely, said Chief Justice Marshall, "is intercourse and communication, interstate, between States, and international between nations"; and further it was said, "to regulate commerce is to prescribe the rules by which commerce is to be governed; that is, the conditions on which it shall be conducted" (Gloucester Ferry Co. v. Penna 114 U. S. 196-).

Commerce seems to have been divided by the decisions

of the courts into two classes, namely: such as is local, and such as is national in its character. The first includes matters properly local and such as are incidents and aids to interstate commerce; and the second, only such matters as affect the public at large or are national.

From the wording of the clause it would seem , that the power to regulate all commerce, properly so called, and that alone, and not such as is incidental and may be justly a part of the police power of the States, rests in Congress. So also , a history of the discussions at the time of its adoption, would seem to bear us out in this construction, the chief end being to establish one uniform control over the whole matter and thus to correct the evil of the existing authority in the several States and avoid various discriminating laws .

Notwithstanding all this, as to the first class, the courts have uniformly held, from *Cooley v. Pennsylvania*, 12 How. 299, down to the present, that the States and Congress have concurrent jurisdiction, so that where a State has passed a statute, it will be held valid, if not in conflict with public policy or some act of Congress on the same subject. (*Ward V. Maryland*, 12 Wall., 418, 430; *Henderson*

v. Mayor of New York, 92 U. S. 259; Gloucester Ferry Co. v. Penna. 114 U. S. 196; Wabash R. R. Co. v. Illinois, 118 U. S. 557; Miller on Const. 454 and cases cited.)

As to the second class, the courts have been equally uniform in holding that Congress has exclusive jurisdiction and that when it has not exercised its power, it is conclusive evidence that ~~it~~^{it} intends the same shall remain free from legislation. (Pickard v. Pullman Palace Car Co. , 118 U. S. 34; Pembina Mining Co. v. Penna. 125 U. S. 181). In other words , Congress alone has power to control commerce in matters susceptibleⁱ of general and uniform regulation; but that in matters that are effected by local legislation, the power to regulate commerce is possessed by both the Federal and State legislatures, Congress being supreme whenever acting. Phila. & Steamship Co. v. Penna., 122 U. S. 326; Pembina Mining Co. v. Penna. 125 U. S. 181; in the latter case many authorities are cited sustaining both propositions.)

one time

It may be interesting to note that at ^{one time} United States Courts held that this concurrent power applied the same to the second class as it is now held that it applies to first class. (Pierce v. N. H., one of the License Cases,

5 Howard 564.)(

This classification, while not expressly stated, was indicated by Johnston J. in *Gibbons v Ogden*, 9 Wheat., 1, and was expressly stated for the first time in *Cooley v. Penna.*, 12 How. 299, which has ever since been the leading authority. It held that the law regulating pilots and pilotage, though amounting to a regulation of commerce, not in conflict with an act of Congress, was valid. Congress had to a limited extent regulated, the same, yet as the State law did not positively conflict with the acts of Congress, it was held a valid exercise of State authority. The broad rule was laid down, that "Whatever subjects of this power are in their nature national or admit of only one uniform system or plan of regulation may justly be said to be of such a nature as to require exclusive regulation by Congress".

While this classification may do very well for convenience, and the regulation as to the second class be properly controlled by Congress alone as just stated, yet as to the first class, it would seem, bearing in mind the principle that "the power not delegated to the United

States by the constitution nor prohibited by it to the States, are reserved to the States," that well might this right to concurrent power be questioned. For as has well been said:- "The power sought to be exercised is either delegated or reserved; either exclusive in Congress or the States. There is no middle ground." From a logical standpoint it would seem that a truer statement was never made, and on what grounds the courts can legally justify their deviation from the same, is not easily to be discerned. The matter should either be governed by the States and them alone, or by Congress and it alone. If it is local and belongs to the police power, and does not in effect regulate commerce among the States, then it is proper for the States to legislate; but if it in reality does regulate commerce, then it is entirely outside the jurisdiction of the States, and Congress only can control it. Were it otherwise it would admit as it does at present, of the usurpation of the powers of the States by that of the general government, and vice versa when Congress has not acted. An examination of the cases show this to be, in most instances, to the detriment of the States; Congress having power at any time to override the statutes of the States, and in effect legislate upon

purely local matters. Yet it has not been without the opposite result in many cases. By such a holding much trouble and dispute in a certain line of cases would be avoided. There would, however, still remain the other very perplexing question in a close case, as to whether it should fall on one side or the other of the dividing line between State and congressional control, and to this we will now turn our attention.

Upon this class of cases, while in general, the United States courts have, with much accuracy, made many just discriminations, still there has been a marked tendency, especially in the last few years, to give to the States control over matters belonging absolutely to Congress. That the courts are by no means settled on this subject, is also evident from the fact that in nearly every close case from two to four of the judges have dissented.

An examination, in order, of the many interesting and important cases wavering about this border line would afford much profit, yet as this subject will not permit of so extensive a discussion, I can do no better than to refer the reader to Cooley's Amer. Const. Law. pp. 69-74; 34 N. W. 1, especially the notes at page 11; 4 Harv.

Law Review, 221; 24 Am Law Review, 25; and other more recent references will be cited later, where collections of many cases in point may be found, in which various decisions have been reached. By an examination of these, we find evidence of two factions among the judges of the United States Supreme Court: one holding strictly to what would seem the better rule, that the only conditions or taxes which a State may impose upon foreign corporation engaged in interstate commerce, is that of a tax upon its real and personal property actually having a situs within the State. That such a tax may be levied has uniformly been sustained. The other view, being more liberal with the States seems to have been gradually giving the States greater powers. Step by step have they allowed a tax, first on the property, then in succession, on the capital stock, business, franchise, etc.. While it has not, in each case, been so called, yet in effect it would seem to have amounted to the same. Such have been the tendency of the courts in the line of cases of which the more important are the following: Tel. Co. v. Mass. 125 U. S. 530; Western Union Tel. Co. v. Atty Gen. of Mass. 141 U. S. 40; and Pullman Car Co. v. Penna. 141 U. S. 18; and Pullman Palace

Car Co. v. Hayward, 141 U. S. 36. While these cases thus far may possibly be harmonized upon the ground as the court decided, that it was a tax upon property within the State and not upon a franchise or otherwise, yet it may be questioned as to whether they were in every case well decided. It would seem by an examination of the, Pullman Car Case 141 U. S. 18 and previous decisions, that the very strong dissenting opinion in that case should prevail, for nowhere up to that time can a decision be found holding that property in transit through a State into another has a situs within such State through which it may pass.

In the recent case of Grand Trunk R. R. Co. v. Maine 142 U. S. 226, we find a climax to this class of decisions. It is a case that is attracting much attention among lawyers and bids fair to be of continuing interest as well as of great importance. We will therefore consider the same at length.

The Grand Trunk is a foreign railroad corporation organized in Canada with headquarters at Montreal, and in 1853 it leased of a Maine corporation its railroad operating through Maine, New Hampshire and into Vermont, thus forming a through line from Canada through the States named. Subsequently Maine passed a statute to the effect that every

corporation etc. operating a railroad in that State, should pay to the State Treasurer for the use of the State, "an annual excise tax for the privilege of exercising its franchise" in the State; such tax to be ascertained substantially by dividing the gross amount of receipts from transportation by the total number of miles operated and multiplying this result by the number of miles in Maine. A certain percent of this result constitutes the tax in question. The company refused to pay the same on the ground that it was an interference with interstate commerce, and hence this action by the State of Maine.

In a note on this case, it was well said: "The case turned upon the question of the right of a State to pass statutes taxing the gross receipts of a railroad for each mile operated within its limits regardless of the fact that said road extended into other States and thus as it would seem, was brought within the provisions of the constitution as to regulations of interstate commerce as claimed by the Grand Trunk. Nevertheless the Maine statute was held constitutional on the ground that it provided an excise tax for the privilege of exercising the railroads franchise within the State, i. e. for the right to engage in the bus-

iness of transportation .

The prevailing and dissenting opinions in this case, both seem to assume that a State has a right to tax the franchise of a foreign interstate commerce corporation, and apparently the only difference in the two opinions is as to the mode of levying the same. Were this strictly true it would seem to be unimportant. It would seem to have been clearer if Judge Bradley had based his dissent upon the plain ground, that a State has no right to tax a franchise under such circumstances . This was really the basis of his decision, although he may properly have argued that it was not for him to say that the ingenuity of man could, in no way, invent a method by which such franchise might be constitutionally taxed , for in reality it would in fact seem impossible.

For convenience in the discussion of this case, we will assume that a foreign corporation is organized and now operating a railroad in the State of Pennsylvania and is desirous of entering New York for the purpose of carrying on interstate commerce. The first question is, is it necessary for the corporation to stop and knock at the door for admission, or may it freely enter therein without such

consent? Is it a right to which they are entitled or is it a subject of comity which may be denied? In general it may be said that it is a right which cannot be denied to such corporations . To this there might seem to be the possible exception before referred to and which would furnish the most favorable argument in support of the Maine case, i. e. that no railroad corporation engaging in or intending to engage in interstate commerce may lawfully enter the State of New York or any other State for the purpose of carrying on or engaging in interstate commerce without permission from ~~the~~ that State, for at the outset it would seem, before it can lay a rail in that State, it must first obtain lawful possession of the land upon which to lay the same, and practically the only means of gaining the title to such land is through the right of eminent domain, for while in some instances it might possibly buy up the necessary lands of the individuals owning the same , there would still remain the practical difficulties of obtaining the right to cross public highways; and again, while it may be said that they might purchase the railroads of corporations already organized in that State, still that could not be done until the State had given the corporation the right to sell the same

This right of eminent domain, they claim, is a sovereign right resting absolutely in the sovereign power of the State. It, and exemption from taxation, and some others are extraordinary franchises to which comity never extends and which can be gained only by the direct consent of the State. It being a sovereign right, no other individual State can compel the exercise thereof. Thus it would seem that in each instance practically the consent of the State must be had.

Hence no State being under ~~any~~ compulsion to grant the permission of condemning property, may withhold the same entirely, or as would naturally follow, consent to the same upon such conditions as it may see fit to impose, such as that it shall pay a certain sum for all property confiscated that it shall take out a license, pay certain taxes upon it its franchise, etc.. It is upon this reasoning that they might best endeavor to sustain the validity of the tax in the Maine cases, i.e. the right to levy a tax on a franchise granting the privilege to carry on transportation within and through the State, though this be interstate commerce. This unlimited power to prescribe conditions precedent, and hence that of taxation, would seem logically to be sustained by the above reasoning. But not so, for at this

point we are met face to face with another line of argument which leads to an opposite conclusion . Section VIII. of Article I. of the United States Constitution reads as follows: " Congress shall have power to regulate commerce between the nations, among the several States and with the Indian tribes." What is granted to Congress by the constitution is at the same time denied to the States. Therefore whatever is meant by regulation of commerce, it is certain that with that, the States have no right to interfere in any way whatever. That taxation is one of the most common and most forcible means of regulation, must be conceded. That there can be no commerce without goods or something to transport, and also that there can be none without the transportation of the same, I submit must also be conceded. The one is as an essential element to commerce as the other; they are inseparable. Hence that a tax upon one is also a tax upon the other, must without question be acknowledged, and to say that ^a tax upon either or both would be a tax upon commerce, would be so entirely self evident as to become superfluous. That a tax upon the right of transportation or a franchise granting the same as in the Maine case, is also a tax upon the transportation itself

and hence as above shown upon commerce and upon the gross receipts upon which the same is estimated, is an evitable conclusion. A tax upon commerce is a regulation upon commerce which belongs exclusively to Congress, and if exercised by a State, as in the Maine case, is unconstitutional.

We, therefore, from these two lines of reasoning come to the conclusion, that while a State is said to be sovereign in its power, it is only so, so far as these powers have not been delegated to the general government, and when so delegated, as is the regulation of commerce, then the exercise of the same by the State becomes unconstitutional and of no effect.

Again, as has been ^{said,} any condition precedent to the entrance within the State of a foreign corporation not engaged in interstate commerce, may be imposed; but to this, a corporation being held a person for the purpose of jurisdiction there is found to be an exception decided in the case of Doyle v. Continental Ins. Co. 94 U. S. 535, where the State imposed a condition that no corporation should appeal any case to the United States Courts. It was held that a corporation for this purpose being a citizen, and the constitution providing that no citizen in such cases shall be deprived of the right of appeal to those courts,

that the condition was unconstitutional and void and could not be enforced. In other words while a State may impose any condition precedent as a privilege of entering the State such condition must not be in conflict with the provisions of the United States Constitution, for that is supreme and to that each State must bow. So while State may not be compelled to exercise the right of eminent domain, yet in exercising it, it cannot annex any unconstitutional condition. Hence a tax on a franchise for the right of transportation being a tax on transportation and therefore on commerce cannot be imposed as in the Maine case, it being a regulation of commerce, which is under the control of Congress alone.

As to eminent domain, we may conclude that no State can refuse admittance to a foreign corporation engaged in interstate commerce by a direct act on its part; neither can it be compelled to act and grant this right in order that a corporation may enter for the purpose of carrying on commerce. By its silence, it might seem to be able to keep such a corporation out, but it must be remembered that the general government in its supreme power may exercise this right for all public purposes and grant the same

to corporations engaged in interstate commerce, whether they be organized by the government itself, or created by one of the States. It may take hold itself and exercise this power but it cannot compel the States to exercise it. A State cannot be mandamusd. This view is upheld in the case of *Stockton v. Baltimore & Ohio R. R. Co.* Vol. I Interstate Commerce Reports 411. In that case the Staten Island Rapid Transit R. R. Co., by act of Congress was authorized to build a bridge across " Arthur Kill, a sound between Staten Island and New Jersey. The corporation was created in New York and Congress granted this right of eminent domain. The court held it to be a lawful exercise of the same, and while this exercise was over a river, yet the courts said that the right would be the same over land.

Were this right denied to Congress, then scarcely a case could arise where the consent of the State must not first be obtained before carrying on interstate commerce. And effective barrier would thus be interposed to the execution of the constitutional power vested in Congress.

Again by the weight of authority it would seem that that same conclusion would be reached in regard to the Maine case.

Should an individual, a partnership, an association, in fact any one or any thing short of a corporation, engage in interstate commerce, never for a moment, would the right of a State to tax the same for such privilege, or in any manner whatever other than to tax the property actually having a situs within the State, be claimed.

What authority there is for singling out a corporation, by means of which most or all of this kind of business is carried on, and taxing it freely is a question difficult to answer. The clause in question says that Congress shall have power to regulate commerce. It does not say or mean simply when it is carried on in any particular manner or by any particular person, but rather in all cases whether by a citizen or corporation.

In *Gloucester Ferry Co. v. Penna.* 114 U. S. 196, the court said : "Interstate commerce by a corporation ~~by~~ is entitled to the same protection against State exaction which is given to such commerce when carried on by individuals."

When this clause was adopted there were in existence, as stated in *Bank of Augusta v. Earle*, 13 Pet. 519, many large corporations carrying on this business between nations,

and the court in that case after enumerating some of the corporations so engaged, said: "This state of facts forbids the supposition that ^{it} was intended in the grant to Congress, to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on; it is general and includes alike commerce by individuals, partnerships, associations, and corporations." Again, the power given to Congress to regulate commerce is not confined to the instrumentalities of commerce known or in use when the constitution was adopted, but keeps pace with the progress of the country and adapts itself to the new developments of time and the surrounding circumstances. (*Pensacola Tel. Co. v. Western Union Tel. Co.* 6 Otto, 1-24.)

In *Crutcher v. Comm. of Ky.* 141 U. S. 47, the court said: "If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other States, it would not be within the province of the State legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege

granted by the State; it is a right which every citizen of the United States is entitled to exercise under the constitution and laws of the United States; and the accession of mere corporate facilities as a matter of convenience in carrying on their business cannot have the effect of depriving them of such right, unless Congress shall see fit to interpose some contrary regulation on the subject."

Again in the Gloucester Case the court said: " While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property,-- is invalid and void as an interference with and an obstruction of the powers of Congress in the regulation of such commerce." Again in the Pullman Car Case the court said : " Much reliance is also placed by the plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State, for a license or privilege to carry on interstate or foreign commerce within its limits. But in each of those

cases, the tax was not upon the property employed in the business, but upon the right to carry on the business at all, and was therefore held to impose a direct burden upon the commerce itself. (Moran v. New Orleans, 112 U. S. 69; Pickard v. Car Co. 117 U. S. 34; Robbins v. Taxing Dist., 120 U. S. 489; Leloup v. Mobile, 127 U. S., 64.)

In Leloup v. Mobile, overruling Osburn v. Mobile, a case cited by plaintiffs attorney in the Maine Case, the courts held that a license tax upon a Telegraph Co., engaged in sending messages within and without the State was void. The broad rule was laid down "That no State has a right to lay a tax on interstate commerce in any form, whether by way of duties laid on transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce and amounts to a regulation of it." To the same effect is the case of Asher v. Texas, 128 U. S. 129,

A case exactly in point would seem to be the Crutcher case, above cited. The trial and argument of this case was based solely upon an agreed statement of facts, in which it was specifically settled, that for the purposes of

this case, the express company was to be considered as a foreign corporation, no matter what it was in fact, and confining themselves to this agreement the court held that a Kentucky statute requiring that an agent of the United States Express Company, before it shall be allowed to enter that State and solicit business for that Company, should take out a license, was unconstitutional and void as an interference with interstate commerce. To the same substantial effect was *R. R. Co. v. Penna*, 136 U. S. 114. It is claimed that these cases are not in point, because, unless the conditions imposed are complied with, the corporation would be prevented from engaging in interstate commerce, while in the *Maine Case*, the State does not say that they cannot come in and engage in interstate commerce, but rather that after they are in and so engaged, that they claim the right to tax them. This argument would seem to be very immaterial, for in either case the tax if paid, would have the same effect; it would amount to a tax on commerce.

The only case cited in support of the prevailing opinion in the *Maine Case*, was that of an insurance company and as insurance companies are not held to be engaged in interstate commerce, it would not seem to be in point.

Another case which the attorneys for the State placed much reliance upon, is that of the State tax on Railway Gross Receipts, 15 Wall. 284, but this case has been practically overruled in the Steamship Co. v. Penna. 122 U. S. 326, also in Fargo v. Mich. 121 U. S. 230, and numerous other cases which might be cited. Besides the State Tax Cases were really decided upon the ground that it was a tax upon the gross receipts after they had been mingled with the property of the State, the corporation being a domestic corporation. Therefore, it could not be in point, for in the Maine Case the corporation was a foreign corp. with its headquarters at Montreal, and in all probabilities no part of the gross receipts ever became mingled with the property in the State of Maine.

Many more cases might be cited supporting the view taken but most of them may be found cited in those already referred to.

Again, it is argued that the privilege of carrying on interstate commerce through Maine, may be taxed as such or within that State, but as above seen, in the Crutcher case, the right to engage in commerce is not a franchise. The corporation does not need a franchise for that purpose; it

is a right secured to it by the U. S. Constitution. If it does not need it, it certainly can have no value, and being of no value, it lacks one of the necessary elements of property, and hence cannot be taxed as such.

From the above we may draw the conclusion that while there is one class of decisions, holding strictly that the only tax which a State may impose upon a foreign corporation engaged in interstate commerce, is that of a tax upon its property actually having a situs within the State, and that equally with other property, yet there is also an increasing line of decisions, holding that it may tax its property charter, capital stock, etc., and as a climax to the whole, according to the Maine case, it may tax its franchise and the gross receipts. In regard to this case Bradley, J., in his dissenting opinion, said: " It comes to this: A State may tax a railroad company upon its gross receipts in proportion to the number of miles run within the State as a tax on its property, and may also lay a tax upon these same gross receipts in proportion to the same number of miles for the privilege of exercising its franchise in the State." And further, he says, I know not ^{for} what else it may not be taxed.

It would seem from the above that a State may even practically exclude such corporations entirely by simply increasing the tax, and if that would not amount to a tax upon commerce, then it would be difficult to know what would. It would seem that the effect of the commercial clause of the U. S. Constitution is thus substantially wiped out.

How the Maine and Crutcher cases can be harmonized how the Pullman Car and Pickard cases, and others can be harmonized, is difficult to ascertain. It would seem, in effect at least, that they cannot be.

Thus it appears, that on so important a subject as this, the United States courts are in hopeless confusion, with a strong tendency favoring the control of the matter by the States. It would seem, that the same unlimited power and destructive effects existing under the Confederacy and which gave rise in part to the adoption of the constitution are destined to again appear; that retaliation may be freely exercised among the States; The disastrous experiences during that period are not involved in obscurity.

That something should be done to check this tendency

is evident. What it shall be is the next question.

Scarcely could we expect, the courts, with an ever-changing personnel, to effect this change with a sufficient degree of permanency.

It would seem that the better way would be, by an act of Congress requiring every corporation, intending to so engage to organize under a general statute of the United States, such corporations so organized being unquestionably free from these objections. But better still, as before suggested, would be an amendment to the United States Constitution, to the effect that a corporation be considered a citizen.

In either case it should be based on the principles, as Bradley, J., says: "That the power of Congress is supreme over the whole subject, unimpeded and unimbarassed by State lines or State laws; that in this matter the country is one, and the work to be accomplished is national; and that State interests, State jealousies, and State prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no States."